# In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1315

MOTOWN RECORD CORPORATION,
*Petitioner,*

vs.

JACK SOLINGER,
*Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

## Brief for Respondent in Opposition

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## SUBJECT INDEX

TABLE OF AUTHORITIES



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### OPINION BELOW

The opinion below is adequately set forth in the Petition.

### JURISDICTION

The jurisdictional requirements are adequately set forth in the Petition.

### QUESTIONS PRESENTED

1. Is a Writ of Certiorari appropriate to review the Ninth Circuit's statement that an antitrust plaintiff must

be within the area of the economy that defendants should have foreseen would be affected by their violations, in light of the fact that plaintiff Solinger has alleged facts showing that he was within the "target area" of the economy that actually was affected by defendants' violations, and was himself the intended target?

2. Is a Writ of Certiorari appropriate to review the Ninth Circuit's statement that plaintiff Solinger's factual allegations showed that his "intention and preparedness" to buy IMS and enter the market was extensive enough to constitute "business or property" protected by the antitrust laws?

## STATUTORY PROVISION INVOLVED

The statutory provision involved is adequately set forth in the Petition.

## STATEMENT OF THE CASE

This case was dismissed by the United States District Court pursuant to a motion treated as one for summary judgment, under Fed. R. Civ. P.12(b)(6) and 56. The Court of Appeals for the Ninth Circuit affirmed the dismissal in part, and reversed and remanded it in part.[1]

The plaintiff below is Jack Solinger, the former president and general manager of Independent Music Sales, Inc. ("IMS"). (R 003-004, ¶ 15). Until March of 1973, IMS was the principal Northern California independent distributor of phonograph records and tape recordings. As an independent distributor, IMS was appointed by various record and tape manufacturers, to distribute their products. These manufacturers included defendants A&M Records, Inc. ("A&M"), and Motown Record Corporation ("Motown"),

1. *Jack Solinger v. A&M Records, Inc., et al* 586 F.2d 1304, (9th Cir. 1978).



the two most important manufacturers an independent distributor could represent. (R 005, ¶ 19). By early 1973, Mr. Solinger had taken substantial steps to purchase IMS from its sole shareholder, and enter the record distribution business. He had obtained detailed accounting projections showing the feasibility of his proposal to buy and pay for IMS (R 60-62, 212, 243-263); he had completed a final agreement to purchase IMS which both he and IMS' sole shareholder were prepared to sign (R 60-62, 212-213, 264-279); he had arranged all financing for the transaction (R 66-67, 213-214, 285-286); arranged for warehouse space, computer facilities, and other facilities until he could relocate the physical plant of IMS (R 213, 280-284); and begun discussions with the teamsters' union concerning jobs and wage scales at his new site (R 213).

Solinger contends that a conspiracy was entered into among the defendants to restrain trade and allocate trade territories. He alleges that pursuant to this conspiracy, defendant A&M refused to give its consent to Solinger's acquisition of IMS, and IMS was then terminated by both A&M and Motown as Northern California distributor. Solinger contends that this was done because he refused to cooperate in allocations of trade territories for A&M and Motown products. He alleges that defendant Eric Mainland Distributing Co., Inc. ("Eric-Mainland") was then made the new Northern California distributor for A&M and Motown products; and that Eric-Mainland and the Southern California distributor, Record Merchandising Company, Inc. ("Record Merchandising"), then began to observe territorial allocations. He alleges that as a result, IMS was forced out of business, and that monopolies were thereby created in the distribution of A&M and Motown records and tapes in Northern California and in Southern California (R 008-009, ¶ 28, R 007, ¶ 24).

## REASON THE WRIT SHOULD BE DENIED

### 1. The Reversal of the Summary Judgment and Remand for Findings Was Correct.

Since this matter was decided as on summary judgment, the plaintiff's allegations must be accepted as being true. The United States District Court must determine that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law.[2] The District Court made no findings whatsoever, and the Ninth Circuit reversed the decision in part and remanded it for that reason.[3]

In defendant Motown's petition for certiorari, however, defendant has characterized the facts in the manner most favorable to it. Based on this characterization, it has attempted to raise important questions of antitrust law, which it urges this court to review.

Plaintiff Solinger contends that the decision of the Ninth Circuit reversing the summary judgment in part and remanding the case was correct, for the reasons stated by that Court, and that no significant questions of antitrust law are presented to this Court.

### 2. Solinger Is Not a "Remote" Plaintiff, Since He Was the Target of the Anticompetitive Acts, and Within the Target Area of the Economy Affected by Them.

The term "standing" is used to describe two different parts of Section 4 of the Clayton Act (15 U.S.C. § 15). These elements of standing under Section 4 are that the plaintiff must have suffered injury to his "business or property", and the injury must be "by reason of" an antitrust violation.

2. Fed. R. Civ. P. 56(c).

3. 586 F.2d at 1307-1308.



As a tool to determine whether a potential new entrant into the relevant market has taken sufficient steps to have a "business or property", and therefore have standing to sue, the Ninth Circuit has adopted the "intention and preparedness" test.[4] To determine whether the cause of plaintiff's damages was "by reason of" an antitrust violation, the Ninth Circuit has adopted the "target area" concept—the "target area" being the area of the economy that is endangered by a breakdown of competitive conditions.[5] A plaintiff must be in the "target area" to have standing. Since the intent of the antitrust law would be thwarted if existing competitors could use anticompetitive means to keep new competitors out of the market, the "target area" of the economy must necessarily include both existing competitors in the market and potential entrants who have shown sufficient "intention and preparedness" to enter the market.

If the elements of standing are properly understood, and if they are applied to the facts which plaintiff Solinger alleged (rather than defendant Motown's characterizations of those facts), it is clear that Solinger is not a remote claimant. Solinger has alleged facts showing he was the actual target of the conspiracy, and therefore was a first tier plaintiff. He was employed in and had a long background in the record business. He had taken every step up to the actual signing of a contract to buy IMS and enter the market. Motown's characterization of Solinger as one "who never risked or lost a penny" is inaccurate and not supported by the facts.

*Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477 (1977), cited by Motown, is not in point. *Brunswick* was a

4. *Id.* at 1309-1310.

5. *In Re Multidistrict Vehicle Air Pollution* 481 F.2 122, 129, (9th Cir. 1973) cert. denied, 414 U.S. 1045 (1973).

Section 7 case, in which the plaintiff complained because the defendant kept failing competitors of plaintiff in business by acquiring them. The alleged violations resulted in a *furthering,* rather than a diminution of competition, leading this Court to conclude that the alleged losses did not occur "by reason of anything forbidden in the antitrust laws." 429 U.S. at 488.

In contrast, Solinger's Section 1 and 2 allegations of conspiracy by defendants, for the purpose of preventing his entry into the market and establishing territorial allocations among competitors, and resulting in elimination of a competitor and of competition, certainly sets forth the kind of injury the antitrust laws were designed to protect against. The profits Solinger lost by reason of his exclusion from the record distribution business directly "reflect the anticompetitive effect . . . of the violation" 429 U.S. at 489.

### 3. Motown Cannot Complain of the Ninth Circuit's "Foreseeability" Language, Which Limits Rather Than Expands the "Target Area" Concept.

Some Ninth Circuit cases have defined the "target area" as "the area of the economy that is endangered by a breakdown of competitive conditions".[6] In theory, this would allow recovery by a plaintiff situated in an area of the economy *actually* endangered by antitrust violations, whether or not an effect on that area of the economy was *foreseeable.* In *Solinger,* the Ninth Circuit has limited this "target area" concept, and required in effect that the injury occur within an area of the economy that both foreseeably

6. *In Re Multidistrict Vehicle Air Pollution, supra; Conference of Studio Unions v. Loew's Inc.* 193 F.2d 51, 54-55, (9th Cir. 1951), cert. denied, 342 U.S. 919 (1952).



would have been and actually was affected by the antitrust violation.[7]

Since Solinger alleges facts showing he was the actual target of the anticompetitive acts, and the only area of the economy involved in this case is the independent distribution of phonograph records and tapes which he was entering, he can easily meet target area tests based on actual injury, foreseeable injury, or both.

Moreover, it is difficult to see how Motown can complain about a test which restricts rather than expands the number of antitrust plaintiffs who have standing.

The two cases cited by Motown for the proposition that the Ninth Circuit's "foreseeability" test has been rejected by other circuits do not support that position.[8] Instead, they hold that if a plaintiff is not within the "target area," it does not have standing even though its injury was foreseeable.

### 4. A Prospective Entrant Who Has Shown Sufficient "Intention and Preparedness" Has "Business or Property" Giving Him Standing to Sue.

As stated earlier, it would defeat the purpose of the antitrust laws if existing competitors in the market could repel

7. "Solinger must show that the injury occurred within an area of the economy that foreseeably would have been affected by the antitrust violation alleged." 586 F.2d at 1310-1311. This is consistent with the Ninth Circuit's decision in *In Re Multidistrict Vehicle Air Pollution, supra,* which held that farmers were not within the target area, even though they alleged damages to their crops caused by antitrust violations in the smog control device field. However, the opinion did not speak of the foreseeability of damages to the agricultural area of the economy.

8. *Calderone Enterprises Corp. v. United Artists Theatre Circuit,* 454 F.2d 1292, 1295-1296 (2d. Cir. 1971); *Long Island Lighting Co. v. Standard Oil Co. of California,* 521 F.2d 1269, 1274 (2d Cir. 1975), cert. denied 423 U.S. 1073 (1976). Both dealt with second tier plaintiffs.

new entrants with impunity, and could use anticompetitive devices against competitors preparing to enter the market that they could not use once the competitor had entered. In this regard, it makes no difference that the potential competitor was (as in *Solinger*) purchasing stock of an existing business[9], or buying or leasing existing assets in the market[10], rather than bringing new facilities into the market. The plaintiff must, however, first give evidence of sufficient "intention and preparedness" to enter the market to constitute a "business or property".[11]

The Ninth Circuit has distinguished between the factual questions of whether an antitrust violation occurred and whether there was damage to plaintiff's "business or property", from the legal question of causation—whether the damage was "by reason of" the antitrust violation.[12] There are sound reasons of economics and judicial policy for this distinction. The question of causation turns on an analysis of the economic structure of an industry and the plaintiff's relationship to that structure. This is a relatively simple determination to make, and the facts concerning it are normally readily available and undisputed. Questions of whether an antitrust violation has occurred, on the other hand, pose notoriously difficult questions of fact and of proof. Questions of almost equal difficulty are posed in the determination of whether a plaintiff has shown sufficient

9. 586 F.2d at 1308.

10. See *Helix Milling Co. v. Terminal Flour Mills Co.* 523 F.2d 1317 (9th Cir. 1975) cert. denied 423 U.S. 1053 (1976); *Hecht v. Pro-football, Inc.* 570 F.2d 982 (D.C. Cir. 1976), cert. denied 98 S. Ct. 3069 (1978).

11. *See Zenith Radio Corp. v. Hazeltine Research,* 395 U.S. 100, 128 (1969).

12. 586 F.2d at 1309.



"intention or preparedness" to constitute "business or property". These are matters best left to the trier of fact.

### A. THE EIGHTH CIRCUIT'S DUFF DECISION DOES NOT CONFLICT WITH SOLINGER.

The alleged conflicts that exist between the *Solinger* decision and the decision in *Duff v. Kansas City Star Co.*[13] are essentially differences of fact. Such factual differences in cases decided by the circuits do not lend themselves to resolution by the Supreme Court. In any event, Solinger took far more steps to enter business than the plaintiff in *Duff*.

### B. THE SOLINGER DECISION DOES NOT SANCTION DUPLICATIVE RECOVERIES.

Motown contends, citing *Illinois Brick Co. v. Illinois,* 431 U.S. 720 (1977), and *Hawaii v. Standard Oil Co. of California,* 405 U.S. 251 (1972), that the *Solinger* decision would sanction double recoveries. These two decisions are distinguishable from *Solinger*. *Illinois Brick Co. v. Illinois* dealt with a suit by a second tier plaintiff, the State of Illinois, for increased prices it suffered because of antitrust violations directed at its contractors. *Hawaii v. Standard Oil* is a parens patriae suit by a first tier plaintiff (the State), but the damages claimed consisted essentially of injuries suffered by second tier victims (its citizens). Solinger's suit, on the other hand, is for damages he himself suffered as a first tier plaintiff.

Secondly, Motown asserts that IMS could sue to assert the same claims that Solinger could. Had IMS sued, however, Motown no doubt would have claimed that IMS lacked standing since it was in the process of selling to Solinger and going out of business. Motown would therefore successfully avoid liability for violations of the antitrust laws,

13. 299 F.2d 320 (8th Cir. 1962).

simply because neither of its intended victims could sue because of the existence of the other.

In any event, the question raised by Motown is entirely hypothetical, since IMS has not sued and no longer can sue (the statute of limitations having run). Even had IMS sued, however, the problem of apportioning damages between two first tier victims of the same conspiracy is not beyond the capabilities of the United States Courts.

## CONCLUSION

For the reasons set forth above, the Writ of Certiorari should be denied, and the case should be remanded to the United States District Court for the factual determination referred to in the Ninth Circuit Opinion.

Respectfully submitted,

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